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No. 601

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

FRANK CONVERSE, ET AL.,
Petitioners,

vs.

GEORGE J. IGEL & CO., INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

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GEORGE J. IGEL & CO., INC.,

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

Petitioners pray that a Writ of Certiorari be issued to review the final judgment of the Supreme Court of Ohio, entered in this cause on July 20, 1966.

I.

CITATIONS TO OPINIONS BELOW

The Decision of September 22, 1964, of the Court of Common Pleas of Franklin County, Ohio, is unreported and is printed in Appendix, *infra*, page 21.

The Judgment Entry of September 30, 1964, of the Court of Common Pleas of Franklin County, Ohio, journalizing the Decision of September 22, 1964, is unreported and is printed in Appendix, *infra*, page 27.

The Decision of January 6, 1965, of the Court of Common Pleas of Franklin County, Ohio, overruling Plaintiffs'

Motion for a New Trial, is unreported and is printed in Appendix, *infra*, page 28.

The Judgment Entry of February 2, 1965, Journalizing the Decision of Court of Common Pleas of Franklin County, of January 6, 1965, is unreported and is printed in Appendix, *infra*, page 29.

The Decision of December 28, 1965, of the Court of Appeals of Franklin County, Ohio, is unreported and is printed in Appendix, *infra*, page 30.

The Judgment Entry of January 25, 1966, journalizing the Decision of Court of Appeals of Franklin County, Ohio, of December 28, 1965, is unreported and is printed in Appendix, *infra*, page 31.

The Order of June 15, 1966, of the Supreme Court of the State of Ohio dismissing the appeal is unreported and is printed in Appendix, *infra*, page 32.

The Order of June 15, 1966, of the Supreme Court of the State of Ohio overruling the motion for an order directing the Court of Appeals for Franklin County to certify its record is unreported and is printed in Appendix, *infra*, page 33.

The Order of July 20, 1966, of the Supreme Court of the State of Ohio denying a rehearing is unreported and is printed in Appendix, *infra*, page 34.

II.

JURISDICTION

The judgment sought to be reviewed was rendered on June 15, 1966, by the Supreme Court of Ohio, when it dismissed Petitioner's appeal as of right from the decision of the Court of Appeals for Franklin County, Ohio on the ground that no substantial constitutional question existed

therein, and when it simultaneously overruled Petitioner's motion for an order directing the Court of Appeals for Franklin County, Ohio, to certify its record. A Motion for rehearing was denied on July 20, 1966. Petitioners have exhausted their rights to an appeal in this cause within the courts of the State of Ohio.

The jurisdiction of this Court is invoked under Section 1257(3) of Title 28, U.S.C., which provides in part:

> "Final judgments or decrees rendered by the highest Court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows: * * * (3) By writ of certiorari * * * where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of * * * the United States."

This cause involves Article I, Section 8, Clause (3) of the United States Constitution, and Sections 185 (a) of Title 29, United States Code.

III.

QUESTION PRESENTED FOR REVIEW

The courts of the State of Ohio have held, directly contrary to the United States Constitution's requirement of federal supremacy, the Statutes enacted by the Congress, and the express mandates of this Court, that controversies involving collective bargaining agreements are matters of state rather than federal law.

The question presented is:

> In determining whether an employer has made an effective withdrawal from a multi-employer bargaining unit, did the courts of the State of Ohio err in rejecting the applicability of federal substantive labor law and in lieu thereof applying state common law inconsistent therewith?

IV.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The pertinent provision of the United States Constitution relevant herein is Article I, Section 8 (3), which states in part:

> "The Congress shall have power * * * To regulate Commerce with foreign Nations, and among the several States and with the Indian Tribes; * * *"

The provision of Title 29, United States Code Annotated, Section 185 (a), (hereinafter referred to as the Taft-Hartley Act, Section 301), relevant herein is:

> "(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

V.

STATEMENT OF THE CASE

Petitioners, composing the Board of Trustees of a Health and Welfare Trust Fund established pursuant to Section 302 of the Taft-Hartley Act (29 U.S.C. Section 186 (c)), have brought this action to recover fringe benefit contributions from respondent pursuant to a collective bargaining agreement dated July 23, 1961. Respondent, the George J. Igel & Co., Inc., is an employer which, at the time said agreement was being negotiated, was a member of a multi-employer bargaining unit bargaining with the Union. The issue in this case is whether respondent was bound by

the July 23, 1961 collective bargaining agreement between the Union and the multi-employer bargaining unit.

The Columbus Building Trades Employers Association (hereinafter referred to as the "BTEA") and Local Union No. 18 of the International Union of Operating Engineers (hereinafter referred to as the "Union"), have a history of group collective bargaining which dates back some twenty years.

The BTEA is an association of contractors in the Central Ohio area who employ, among others, members of the Union. The contractors bargain with the Union as a multi-employer bargaining unit.

During the long history of collective bargaining between these two groups, a negotiating committee has represented the interests of the employers' bargaining unit. The negotiating committee had full authority to bind the collective membership of the multi-employer bargaining unit by entering into a collective bargaining agreement with the Union.

George J. Igel, President and majority stockholder of the George J. Igel & Co., Inc., the respondent herein, was, for a number of years, a member of the negotiating committee of the BTEA, and at all times relevant hereto, served as its chairman and chief spokesman.

During the industry-wide 1959 contract negotiations in Ohio, the principal issue was the establishment of a health and welfare plan to be financed by employer contributions.

The employer and Union bargaining committees held numerous bargaining sessions during June and July, 1959, at which George J. Igel was present and functioned as the employer spokesman. On July 23, 1959, final agreement was reached with respect to the new contract, which included a provision for the establishment of a health and welfare fund. On that day, a memorandum of agreement was drawn

up and executed, which set forth the agreement between the parties. The memorandum of agreement specifically set out in writing all provisions of the new collective bargaining agreement that differed from the old one.

Approximately one week later, a formal, re-typed document was taken to all parties for signature. George J. Igel, as Chairman, signed the contract on behalf of the BTEA, along with the other members of the BTEA negotiating committee, Mr. D. F. Knoch and Mr. J. Parker Garwick.

The new agreement obligated the members of BTEA employing operating engineers to pay ten cents per hour for each hour worked by an operating engineer, commencing November 1, 1959, into a trust fund, to be established pursuant to Section 302 of the Taft-Hartley Act.

Respondent, the George J. Igel & Co., Inc., although fully performing all other provisions of the collective bargaining agreement and accepting all the benefits from it, refused to make payments into the welfare trust fund, claiming that it had resigned from the BTEA on June 15, 1959, by sending a letter of resignation to the Executive Secretary of BTEA. Consequently, petitioners commenced action against the George J. Igel & Co., Inc., in the Court of Common Pleas of Franklin County, Ohio, to recover the contributions due it according to the July 23, 1959 collective bargaining agreement. The bargaining agreement did not permit petitioners to utilize the grievance and arbitration procedure. A trial was held without a jury and the Court, applying *state* law, found for the respondent. In an appeal on questions of law, the Court of Appeals affirmed the judgment of the lower court. A Motion to Certify the Record from the Court of Appeals was overruled, and an Appeal as of Right was dismissed by the Supreme Court of Ohio on June 15, 1966, and a Motion for rehearing was overruled on July 20, 1966.

Respondent denies liability on the grounds that it had resigned from the *BTEA* on June 15, 1959, and that immediately prior to its president's executing the formal agreement on July 31, 1959, Mr. Igel informed the Union of its withdrawal from the BTEA. Based upon these facts, the trial court held that as a matter of state law respondent had made a timely and effective withdrawal from the *bargaining unit* as of June 15, 1959, as well as from its membership in *BTEA*. The state courts erroneously equated withdrawal from the *employers' organization* according to its internal rules, with withdrawal from the multi-employer *bargaining unit*. As stated by the trial court:

> "There are found no conditions or inhibitions against a member withdrawing, so that the conclusion to be reached is that a member is at liberty to withdraw voluntarily, or surrender his membership by a failure to pay dues. In short, no formalities are provided or required in order for a member to withdraw. Not only did the George Igel Company voluntarily withdraw as a member but followed this by the discontinuance of the payment of dues.
>
> That being the case, the Court can see no reason why the George Igel Company could not voluntarily resign as a member of BTEA and not be bound by any agreement of that organization entered into after the date of the resignation.
>
> Counsel for plaintiff boldly assert that defendant is bound by the agreement of July 23, 1959, but with this the Court cannot agree. *It is not bound unless it was a member of BTEA at that time,* and as already pointed out, it had resigned as a member prior thereto, and as a further evidence of its non-membership, it paid no dues until 1951 (*sic.* 1961) when it again rendered its membership." (Emphasis added) (Appendix, *infra*, pages 23 and 24.)

The Court reached this legal conclusion in spite of the following facts:

1. Between June 15, 1959 and July 23, 1959, Mr. Igel attended and functioned as the employers spokesman

in four bargaining sessions without informing *anyone* of any purported resignation;
2. Agreement was reached on July 23, 1959, and memorialized in writing, which was *eight days* before the intention of withdrawing from the bargaining unit was communicated to the Union.

Thus, in determining whether the George J. Igel & Co., Inc. had effected a timely withdrawal from the multi-employer bargaining unit and thus escaped liability to petitioners, the court rejected the applicability of federal substantive labor law. Basically, the state courts failed to recognize the distinction between an employer's quitting an employers organization, when notice need only be given to the organization, and withdrawing from a bargaining unit, where *timely* notice *must* be given to the union to be effective. The payment or non-payment of dues is wholly irrelevant to this issue.

The state common law applied by the courts of the State of Ohio is inconsistent with federal substantive labor law, which requires timely notice of an intention to bargain separately; federal substantive labor law is the law which governs the case; the judgment should be reversed and remanded.

VI.

RAISING OF FEDERAL QUESTION

The federal question has been raised throughout all stages of the proceedings in the courts of Ohio.

The issue was met squarely by the trial court in petitioners' Motion for a New Trial when Judge Reynolds specifically and unequivocally rejected any application of federal law as controlling the issue. (See Appendix, *infra*, page 28.)

In the Court of Appeals for the Tenth Judicial District of Ohio, Franklin County, Petitioners' Second Assignment of Error stated:

> "The judgment of the trial court in rejecting the applicability of federal substantive labor law is erroneous and contrary to law."

The Court of Appeals rejected this assignment of error. (See Appendix, *infra*, page 30.)

Similarly, before the Supreme Court of the State of Ohio, Petitioners' Third Argument in its Memorandum of Appellants in Support of Jurisdiction stated:

> "3. Federal law applied to the undisputed facts requires judgment against appellee."

Consequently, the federal question was timely and property raised so as to give this Court jurisdiction to review the judgment on Writ of Certiorari.

VII.

REASONS FOR THE ALLOWANCE OF THE WRIT

The United States Supreme Court has firmly established the rule of law that suits involving collective bargaining agreements must be decided according to *federal substantive labor law*, and that where inconsistent therewith, traditional concepts of state common law must be rejected.

The trial court completely disregarded the mandate of the United States Supreme Court, in denying petitioners' Motion for a New Trial, when it stated:

> "This Court adheres to its original, and is unwilling to concede that the Federal Government has anything to do with a local voluntary association." (See Appendix, *infra*, page 28).

The refusal of the trial court to apply federal substantive law constituted prejudicial error, for the application of federal substantive labor law to the undisputed facts in this case requires judgment for the petitioners.

1. The Constitutional Basis and Implementing Legislation.

The power of Congress to regulate labor relations is based upon Section 8, Clause (3), Article I of the United States Constitution, commonly referred to as the "Commerce Clause." Pursuant thereto, Congress has adopted comprehensive legislation in the field of labor relations.

Section 301 (a) of the Taft-Hartley Act of 1947 (29 U.S.C., Section 185 (a)) controls the issue at bar. The constitutionality of this section was upheld in *Textile Workers v. Lincoln Mills,* 353 U.S. 448, 77 S. Ct. 912, 1 L. ed. 2d, 972 (1957).

2. United States Supreme Court Interpretations of Section 301 (a) of Taft-Hartley.

In *Lincoln-Mills, supra,* this Court held that Section 301 (a) of Taft-Hartley was not merely jurisdictional, but *created a body of federal substantive law applicable to labor contracts.* Courts were thus mandated to determine labor contract rights and duties consistent with *national labor policy,* and federal substantive law controls. In effect, due to the enactment of Section 301 (a) of Taft-Hartley, this Court held that a labor contract is a federal contract, and the enforcement of such a contract is based upon a *federal* cause of action.

Five years later, the Court further interpreted Section 301 (a) of Taft-Hartley in *Charles Dowd Box Co. v. Courtney,* 368 U.S. 502, 82 S. Ct. 519, 7 L. ed. 2d, 483

(1962). Faced with the issue of whether state courts had jurisdiction over collective bargaining agreements, the Court held that state courts were not ousted of their jurisdiction by Section 301(a) of Taft-Hartley, but could exercise concurrent jurisdiction with federal courts, *i.e.*, a suit involving a collective bargaining agreement could be brought for jurisdictional purposes in either a state or federal court.

The next question was what law was to apply when a state court assumed jurisdiction over a dispute involving a collective bargaining agreement. This question was answered in *Local 174 Teamsters v. Lucas Flour Co.*, 369 U.S. 95, 82 S. Ct. 571, 7 L. ed. 2d 593 (1962), decided during the same term, wherein, the Court held that *when state courts exercise their concurrent jurisdiction, they must apply federal substantive labor law!*

In that case, involving a labor contract within the purview of Section 301, a state court applied state substantive law in reaching its decision. The United States Supreme Court refuted this conclusion and said through Justice Stewart:

> "It was apparently the theory of the Washington court that, although *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, requires the federal courts to fashion, from the policy of our national labor laws, a body of federal law for the enforcement of collective bargaining agreements, nonetheless, the courts of the States remain free to apply individualized local rules when called upon to enforce such agreements. *This view cannot be accepted. The dimensions of Section 301 require the conclusion that substantive principles of federal labor law must be paramount in the area covered by the statute.* Comprehensiveness is inherent in the process by which the law is to be formulated under the mandate of *Lincoln Mills, requiring issues raised in suits of a kind covered by Section 301 to be*

> *decided according to the precepts of federal labor policy.* (Emphasis added). (369 U.S. 95, 103). • • •
> The importance of the area which would be affected by separate systems of substantive law makes the need for a single body of federal law particularly compelling. The ordering and adjusting of competing interests through a process of free and voluntary collective bargaining is the keystone of the federal scheme to promote industrial peace. *State law which frustates the effort of Congress to stimulate the smooth functioning of that process thus strikes at the very core of federal labor policy.* With due regard to the many factors which bear upon competing state and federal interests in this area (cases cited) *we cannot but conclude that in enacting Section 301 Congress intended doctrines of federal labor law uniformly to prevail over inconsistent local rules.*" (Emphasis added). (*Id.*, at 104).

Thus, in suits involving a collective bargaining agreement when state and federal law are in conflict and require different results, federal law governs.

For a recent decision on the applicability of this principle, see *Rhine v. United Carbide Corporation,* 343 F. 2d 12 (6th Cir., 1965). In that case, the District Court entered judgment for the plaintiff based upon the law of Kentucky. The Court of Appeals reversed, stating at pages 15 and 16 of its opinion:

> "(W)e believe the District Judge was in error. This suit is founded squarely and solely upon a provision contained in a labor-management collective bargaining agreement in interstate commerce. We believe that this case must be treated as arising under Section 301 of the National Labor Relations Act, 29 U.S.C., Section 185 (cases cited). The applicable law, therefore, is not Kentucky law (as held by the District Judge), but federal law."

As the suit by petitioners against George J. Igel & Co., Inc. is "founded squarely and solely upon a provision con-

tained in a labor-management collective bargaining agreement", the applicable law, therefore, is not Ohio law (as held by the trial court), but federal law. For the most recent affirmance of this principle, see: *Universal Insulation Corp. V. NLRB,* ... F. 2d ..., 53 Labor Cases Para. 11,240 (6th Cir., May 20, 1966).

3. Withdrawal from a Multi-Employer Bargaining Unit.

The issue in this case is whether, according to federal substantive labor law, George J. Igel & Co., Inc., had effected a timely withdrawal from the multi-employer bargaining unit so as to escape becoming bound by the collective bargaining agreement between it and the Union.

The answer to this issue requires consideration of the origin and the nature of multi-employer bargaining. The acts needed to resign from the voluntary association, such as to obviate the requirement to pay dues, is patently governed by state law, and has nothing whatsoever to do with the relationship between the multi-employer bargaining unit and the Union. This distinction the state courts of Ohio expressly refused to accept.

This Court has repeatedly emphasized the distinction and has given its blessing to multi-employer bargaining as a vital factor in the effectuating of the national policy of promoting labor peace through strengthened collective bargaining. *NLRB v. Truck Drivers Local U.,* 353 U.S. 87, 77 S. Ct. 643, 647-648, 1 L. ed. 2d 676, 681-682 (1957). Multi-employer bargaining is a creature, not of the labor statutes, but of the National Labor Relations Board and the courts. It is to be noted that Justice Brennan said for the Court that Congress intended:

> "* * * *to leave to the Board's specialized judgment the inevitable questions concerning multi-employer bar-*

gaining bound to arise in the future." (*Ibid*) (Emphasis added).

Commenting on the competency of the National Labor Relations Board and the authority of its decisions with respect to multi-employer bargaining, Justice Brennan said:

> "The ultimate problem is the balancing of conflicting legitimate interests. The function of striking that balance to effectuate national policy is often a difficult and delicate responsibility, *which the Congress has committed primarily to the National Labor Relations Board, subject to limited judicial review.*" (*Ibid*) (Emphasis added)

This Court has thus affirmed the intent of Congress to designate the National Labor Relations Board as the dominant figure in settling national labor policy through its application of the federal labor laws. When state courts decide labor disputes involving multi-employer bargaining units, they must therefore look to the decision of the National Labor Relations Board, as judicially approved, for the applicable law.

The Board has repeatedly dealt with the question of whether individual employers were bound by the multi-employer groups' collective decisions after an attempted withdrawal from the bargaining unit.

There is no doubt that the George J. Igel & Co., Inc. had the right, *if timely*, to terminate its relationship with the multi-employer bargaining unit and to bargain with the Union as a separate bargaining unit. However, as was said in *Retail Associates, Inc.*, 120 NLRB 388, 393-395:

> "The right of withdrawal by either a union or employer from a multi-employer unit has never been held, for Board purposes, to be free and uninhibited, or exercisable at will or whim. * * * While mutual consent of the union and employers involved is a basic

ingredient supporting the appropriateness of a multi-employer bargaining unit, *the stability requirement of the Act dictates that reasonable controls limit the parties as to the time and manner that withdrawal will be permitted* from an established multi-employer bargaining unit. *Thus, the Board has repeatedly held over the years that the intention by a party to withdraw must be unequivocal, and exercised at an appropriate time.* The decision to withdraw must contemplate a sincere abandonment, with relative permanency, of the multi-employer unit and the embracement of a different course of bargaining on an individual-employer basis. *The element of good faith is a necessary requirement in any such decision to withdraw, because of the unstabilizing and disrupting effect on multi-employer collective bargaining which would result if such withdrawal were permitted to be lightly made.* (Emphasis added)

• • •

We would accordingly refuse to permit the withdrawal of an employer or a union from a duly established multi-employer bargaining unit, except upon *adequate written notice given prior* to the date set by the contract for modification, or *to the agreed-upon date to begin the multi-employer negotiations. Where actual bargaining negotiations based on the existing multi-employer unit have begun, we would not permit, except on mutual consent, an abandonment of the unit upon which each side has committed itself to the other, absent unusual circumstances.*" (Emphasis added)

See: *Shamrock Systems, Inc.*, 155 NLRB, No. 104; see also *Kroger Co.*, 148 NLRB 569, where the Board stated:

"The record establishes that the Employer evinced no clear intent actually to withdraw from joint bargaining until the last *bargaining session on February 25, 1962*, and shortly before the Locals and the employer group reached an agreement. *Although the Employer had indicated prior to this time that it was not interested in the Local's pension proposal, the*

Employer neither sought nor obtained the Union's consent to its withdrawal from multi-employer bargaining (it is also clear from the record that the Employer gave no notice to any other members of the employer group that it intended or desired to withdraw from the group), but, on the contrary, continued to engage in group bargaining thereafter without manifesting any intent to withdraw from the group or giving the locals any clear intention that the employer group was not bargaining in behalf of the Employer. (*Id.*, at page 574) (Emphasis and words added)

• • •

Based on the above, we find that the Employer, by attempting without the Union's consent to abandon group negotiations shortly before an agreement had been reached, did not withdraw from multi-employer bargaining in a timely and effective manner, and therefore continued to remain a member of the multi-employer unit." (*Id.*, at 575) (Emphasis added).

Similarly, in *Tulsa Sheet Metal Works, Inc.*, 149 NLRB No. 120, the Board held that an employer engaged in multi-employer bargaining cannot, *in the absence of an impasse in negotiations and before an agreement has been reached,* effectuate a timely withdrawal from group bargaining. In contrast, in the case at bar an agreement *was* reached and *no impasse* is even suggested in the record.

The fact that Mr. Igel stated during the negotiations that his company had a Blue Cross plan of its own and that it expected some adjustment, was not only equivocal but was a part of the normal give-and-take technique of "bargaining" and far weaker than the facts of *NLRB v. Jeffries Banknote Co.*, 281 F. 2d 893 (9th Cir., 1960). In that case an employer, during negotiations between his association and the union, expressly told the union representative that if the contract contained a profit-sharing clause, he would

not sign. It was specifically found that the union representative:

> ". . . made no statement at this meeting reasonably construed as acquiescence in Jeffries revocation of (the Association's) authority." (*Id.*, at 895).

The Court upheld the decision of the NLRB that the employer's refusal to sign the contract was in violation of the National Labor Relations Act and its attempted withdrawal from the multi-employer bargaining association was ineffectual.

Similarly, in *Universal Insulation Corp.*, 149 NLRB No. 124, enforced by the Sixth Circuit Court of Appeals on May 20, 1966 (..F. 2d ...., 53 Labor Cases, Para. 11,240), the Board held that an employer's statement that he would remain in an employers' association only if a contract being negotiated did not contain a wage increase, *did not constitute a withdrawal* so as to relieve the employer from liability for an agreement negotiated by the association.

The state courts of Ohio determined that respondent's resignation from the employers' association was *ipso facto* withdrawal from the bargaining unit, irrespective of notice to the union. There is a distinction, and the federal law is clear that respondent's attempted withdrawal from the multi-employer *bargaining unit* was untimely, and ineffectual to escape being bound by the collective bargaining agreement of July 23, 1959.

VIII.

CONCLUSION

This case presents a constitutional question regarding the interplay of federal and state law with respect to collective bargaining agreements.

The courts of the State of Ohio have refused to follow the mandates of the United States Supreme Court when they rejected federal law as controlling in this case. The Supreme Court of the State of Ohio has put itself on record as authorizing the courts of Ohio to disregard the preemption of federal law, the United States Constitution's requirement of federal supremacy, the Statutes enacted by The Congress and the mandates of this Court. The rule of law expressed by the courts of Ohio strikes at the very essence of the federal system and should be reversed.

The public policy behind the national labor laws and this Court's interpretative decisions seeks to assure a minimum of labor strife and unrest, and a basic sense of equality and "fair play" in labor-management relations. The efforts of respondent to evade its responsibilities towards its employees and *its fellow employers* by having its president negotiate an agreement binding on the employers' bargaining unit and then subsequently to have its president claim that *his* company is not bound by the agreement *he* negotiated and *he* signed, is not only repugnant to national labor policy but is perfidy in its most blatant form.

The clearest justification for affirming respondent's liability for welfare contributions pursuant to the agreement which George J. Igel signed was expressed in *Lozano Enterprises v. NLRB,* 327 F. 2d 814 (9th Cir., 1964). Here, the court pointed that a collective bargaining agreement could not be construed by the technical niceties of conventional contract law (pp. 818-819) but must be construed to effectuate the purposes of national labor policy. Reflecting on the actions of an employer similar to those taken by respondent, the court said at page 819 of the opinion:

"To permit an employer to do what this employer did would encourage results directly contrary to the purpose of the collective bargaining provision of the Act."

The courts of the State of Ohio have decided a federal question of substance in a way not in accord with applicable decisions of this Court.

The Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

COURT OF COMMON PLEAS OF FRANKLIN COUNTY, OHIO

No. 210,726

FRANK CONVERSE, ET AL.,

Plaintiffs,

vs.

GEORGE J. IGEL & CO., INC.,

Defendant.

DECISION

Rendered this 22nd day of September, 1964.

REYNOLDS, J.

In this case a jury was waived and trial had to the Court.

Plaintiffs are the trustees of a fund known as "Ohio Operating Engineers Health and Welfare Plan" and bring this action to recover from defendant money claimed to be due under a contract between the Union and Building Trades Employers' Association of Columbus, hereafter referred to as BTEA and Locals Nos. 18, 18A and 18B of the International Union of Operating Engineers, hereafter referred to as the Union.

Defendant had been a member of BTEA since about 1950, and George J. Igel, President of defendant Company, was a member of the committee representing BTEA along with Parker Garwick and D. F. Knoch.

A previous contract between the parties had existed May 1, 1959, but was not then renewed; however, by agreement

the terms of the expired contract were to be complied with until a new contract should be entered into.

Several meetings were held but not until July 23, 1959, was a new contract agreed on and signed by Frank P. Converse, President of International Operating Engineers, C. Hittner, District Representative and B. Hagefeld, Secretary, representing the Union; Garwick, Knoch and Igel represented BTEA.

In the meantime, on June 15, 1959, Igel, on behalf of George J. Igel and Company, sent a letter resigning as a member of BTEA. This letter was received by BTEA and was in the files of that organization up to the time of trial.

The reason given by Igel for his company's withdrawal was dissatisfaction with the proposed welfare program and with the work of Hand, who was the Secretary of BTEA.

At this time Igel, on behalf of his own company, was endeavoring to work out a welfare program with the Union, and when the contract of July 23rd was presented to him for signature by Curtis Hittner, the local Union representative, he advised Hittner that his company was no longer a member of BTEA, but he did sign the agreement as a member of the negotiating committee at Hittner's insistence.

The contract of July 23, 1959, provided in Article 10 thereof as follows:

> "10. Ten cents per hour worked shall be paid on and after November 1, 1959, for a Welfare Program trust fund to be created and approved by a Joint Committee of Union and Employer representatives on which the Association herein shall have representation or shall have representation on the Committee selecting such joint Committee to create and establish such Welfare Program trust fund. In the event such Welfare Program trust fund is not established and approved by November 1, 1959, the said ten cents per hour worked payment

of this paragraph shall be paid instead to employees covered hereby as wages, unless otherwise mutually agreed by the parties hereto."

It is of special note that the welfare payments were not to become effective until on and after November 1, 1959, and whether the 10 cents per hour worked was to be paid into a trust fund, was conditional on the establishment of such a fund; otherwise it was to constitute simply a wage increase payable directly to the employees of the members (*"unless otherwise mutually agreed by the parties hereto"*): (Underscoring ours).

From a reading of the Constitution and By-Laws of the BTEA it appears that membership was limited to employers in the Building Trade Industries whether an individual, partnership, or corporation, with provision for yearly dues payable in advance.

There are found no conditions or inhibitions against a member withdrawing, so that the conclusion to be reached is that a member is at liberty to withdraw voluntarily, or surrender his membership by a failure to pay dues. In short, no formalities are provided or required in order for a member to withdraw. Not only did the George Igel Company voluntarily withdraw as a member but followed this by the discontinuance of the payment of dues.

That being the case, the Court can see no reason why the George Igel Company could not voluntarily resign as a member of BTEA and not be bound by any agreement of that organization entered into after the date of the resignation.

Counsel for plaintiff boldly assert that defendant is bound by the agreement of July 23, 1959, but with this the Court cannot agree. It is not bound unless it was a member of

BTEA at that time, and as already pointed out, it had resigned as a member prior thereto, and as a further evidence of its non-membership, it paid no dues until 1951 when it again renewed its membership.

Counsel further assert that the Union had no notice of defendant's withdrawal from the BTEA, but George Igel testified that when Mr. Hittner, the Union's local representative, presented the contract of July 23, 1959, he advised Hittner that his company was no longer a member of BTEA but signed the agreement on Hittner's insistence so that the Union men could continue to work and Igel signed as a member of the committee appointed to negotiate with the Union and not as representing the Igel Company.

Prior to July 23, 1959, the Union was negotiating with the Ohio Contractors Association, there having been delays due to inability to agree upon a Health and Welfare program, but finally an agreement was reached which embodied the same conditions as the agreement here involved and served as a pattern therein. It was not until the contract with the Ohio Contractors Association was signed that an agreement with BTEA was supposed to have been consummated.

It is worthy of note that the contract with the Ohio Contractors Association had attached thereto a list of all the members of that association while the contract with BTEA failed to list the members thereof, so that the records in the file do not show who the members of BTEA were.

In the meantime Igel informed Hittner, representing the Union, that he wanted to discuss with the Union a Health and Welfare Plan and at least one discussion was had with the Igel Company, looking to a separate agreement, but nothing seems to have resulted therefrom.

The Union was cognizant of this effort on the part of the Igel Company and that that company was dissatisfied with the Health and Welfare provisions of the contract of July, 1959.

It was not until March 11, 1960, that the Union and BTEA actually contracted for the trust relating to the Health and Welfare provisions set out in the contract of July 23, 1959.

In that agreement George Igel took no part and, as a matter of fact, was attempting to reach a separate agreement with the Union.

In the agreement of March 11, 1960, the interested parties agreed upon a modification of the provisions of paragraph 10 of the contract of July 23, 1959.

The provision there was that if a trust agreement was not reached before November 1, 1959, that the 10 cents per hour which would otherwise go to the trust fund would be paid to the employees directly, "*unless otherwise mutually agreed by the parties hereto*" Underscoring ours.

The parties involved did mutually agree in March, 1960, that, although no trust agreement was made before November 1, 1959, the trust agreement should be retroactive as of that date.

The parties to that agreement thus changed the provision of the agreement of July 23, 1959, providing for a straight increase in wages in case a trust agreement was not reached by November 1, 1959.

In the meantime, apparently under date of July 27, 1959, the Ohio Contractors Association and the Union entered into an agreement designated as Appendix "B" which provided for an escrow agent to whom the ten cents per hour

worked should be paid by the employer pending the establishment of a trust.

The Court is unable to find from the record that BTEA ever agreed to a similar arrangement, although counsel assert that on October 12, 1959, it was agreed between BTEA and the Union that, pending the establishment of the Trust, members of the BTEA would have the choice of either making the ten cents per hour worked into an escrow account or accrue the payments into the Trust fund when finally established.

If such an agreement were made, it must have been only an oral one as none of the exhibits offered in evidence reflect any such agreement, and in any event there is no evidence to show that defendant was bound thereby.

Plaintiff cites the case of *U. S. Steel Workers vs. National Labor Relations Board,* 174 Fed. 2d, 875, as authority for the claim that the Board has authority to require collective bargaining for Health and Welfare provisions. There is no dispute as to the propriety of such authority, but the case is not applicable here, where defendant not only was not refusing to negotiate, but was actually in the process of attempting to negotiate, separately as an employer of labor and the Union officials were cognizant of this fact.

Another case cited is *N.L.R. Board vs. Truck Drivers Local Union,* 353 U. S. 87. There the primary question was as to the legality of a multi-employer association bargaining jointly, and acting in concert with respect to a strike by the Union against one of the members of the multi-employer association. It has nothing to do with the question here involved.

The Court concludes that Igel and Company was not amenable to the provisions of the contract of July 23, 1959, as supplemented by the trust agreement of March, 1960, until and after it again became a member of the BTEA in 1961, since which time it is complying with the provisions of the Trust agreement.

It is therefore ordered that this action be dismissed at plaintiff's costs.

Having reached this conclusion, it is unnecessary to decide whether plaintiffs are the proper parties to prosecute the present action or whether this should have been done by the Administrator of the Fund, pursuant to the provision set out in 5.16 of the Trust agreement, which reads as follows:

> "* * * All suits and proceedings to recover Employer payments or to enforce or protect any other right, demand or claim on behalf of the Trustees shall be instituted by the Administrator of the fund in his capacity as such."

DANA F. REYNOLDS, *Judge*

APPEARANCES:

KNEPPER, WHITE, RICHARDS AND MILLER,
Attorneys for Plaintiffs,

THOMAS W. APPLEGATE,
Attorney for Defendant.

"ENTRY

"This day this cause came on to be heard upon the amended petition of Plaintiffs, the interrogatories submitted with the original petition, and the answer of the De-

fendant, and a jury having been waived and parties appeared and submitted their evidence to the Court.

"The Court having considered the pleadings, the evidence, the exhibits, and the briefs submitted on behalf of the parties, finds the issues in favor of the Defendant in that the action of the Plaintiffs should be dismissed.

"It is therefore Ordered, Adjudged and Decreed that the amended petition of the Plaintiffs be and the same hereby is dismissed with prejudice at the Plaintiffs' costs.

"Exceptions of the Plaintiffs are hereby noted."

/s/ Reynolds
"Dana F. Reynolds,
"*Judge*"

"APPROVED:
"Knepper, White, Richards & Miller,
"By /s/ Richard L. Miller
"*Attorneys for Plaintiffs*
/s/ Thomas W. Applegate
"Thomas W. Applegate
"*Attorney for Defendant*"

DECISION

[Filed January 6, 1965]

This court adhered to its original, and is unwilling to concede that the Federal government has anything to do with a local voluntary association.

There are certainly some limitations to the authority of the National Relations Board, and in the opinion of this Court that authority does not extend to the extent that it reaches or covers the present situation.

Plaintiffs' motion for a new trial is overruled.

/s/ Reynolds, *Judge*

ENTRY

This day this cause came on to be heard upon the motion of plaintiffs for a new trial, and the Court upon consideration of the same finds said motion to be not well taken and overrules the same.

Exceptions of plaintiffs are hereby noted.

/s/ Dana F. Reynolds, *Judge*
per Leach J.

APPROVED:

/s/ Knepper, White, Richards & Miller

/s/ John W. Palmer
Knepper, White, Richards & Miller
By John W. Palmer
Attorneys for Plaintiffs

/s/ Thomas W. Applegate
Thomas W. Applegate
Attorney for Defendant

IN THE COURT OF APPEALS FOR FRANKLIN COUNTY, OHIO

FRANK CONVERSE, et al.,
Plaintiffs-Appellants,

v.

GEORGE J. IGEL & CO., INC.,
Defendant-Appellee.

DECISION
Rendered on December 28, 1965

KNEPPER, WHITE, RICHARDS & MILLER,
MR. RICHARD L. MILLER and
MR. JOHN W. PALMER, *of Counsel*,
150 East Broad Street, Columbus, Ohio,
For Plaintiffs-Appellants.

APPLEGATE, BOLON, BOYD & ALBAN,
MR. THOMAS W. APPLEGATE, *of Counsel*,
8 East Broad Street, Columbus, Ohio,
For Defendant-Appellee.

APPEAL ON QUESTIONS OF LAW

PER CURIAM.

This court has carefully considered and studied the assignments of error, the arguments and briefs of counsel, the very voluminous bill of exceptions, as well as all other parts of the record in this case, and are unable to find any prejudicial errors to the rights of the plaintiffs-appellants. Therefore, the judgment of the trial court is affirmed.

BROWN, P. J. CARLISLE and GRAY, JJ., of the Fourth Appellate District, sitting by designation, concur.

ENTRY

This day this cause came on to be heard upon the appeal of plaintiffs-appellants and the Court upon consideration of the assignments of error, the arguments and briefs of counsel, the bill of exceptions and all other parts of the record, finds that there are no prejudicial errors to the rights of the plaintiffs-appellants and that the judgment of the trial Court should be affirmed.

It is, therefore, ordered that the judgment of the trial Court be and the same hereby is affirmed. Exceptions of plaintiffs-appellants are hereby noted.

/s/ BROWN, P. J.
Judge

/s/ CARLISLE, J.
Judge

/s/ GRAY, J.
Judge

APPROVED:

/s/ T. APPLEGATE
THOMAS W. APPLEGATE
APPLEGATE, BOLON, BOYD & ALBAN
Counsel for Defendant-Appellee

/s/ J. W. PALMER
JOHN W. PALMER
KNEPPER, WHITE, RICHARDS & MILLER
Counsel for Plaintiffs-Appellants

IN THE SUPREME COURT OF THE STATE OF OHIO

The State of Ohio,)
) 1966 Term
City of Columbus.) To wit: Wednesday, June 15, 1966.

FRANK CONVERSE, ET AL.,
Appellants,

vs.

GEORGE J. IGEL & CO., INC.,
Appellee.

No. 40069

APPEAL FROM THE COURT OF APPEALS FOR FRANKLIN COUNTY

This cause, here on appeal as of right from the Court of Appeals for Franklin County, was heard in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

It is further ordered that the appellee recover from the appellant its costs herein expended; that a mandate be sent to the Court of Common Pleas to carry this judgment into execution; and that a copy of this entry be certified to the Clerk of the Court of Appeals for Franklin County for entry.

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court this ..... day of ..... 19.....

THOMAS L. STARTZMAN, *Clerk.*

MOTION FOR AN ORDER DIRECTING THE COURT OF APPEALS FOR FRANKLIN COUNTY TO CERTIFY ITS RECORD

It is ordered by the Court that this motion is overruled.

COSTS:

Motion Fee, $20.00, paid by John W. Palmer.

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journals of this Court.

Witness my hand and the seal of the Court this..... day of ....., 19.....

THOMAS L. STARTZMAN, *Clerk*

To wit: Wednesday, July 20, 1966.

REHEARING

It is ordered by the court that rehearing in this case is denied.

I, Thomas L. Startzman, Clerk of the Supreme Court of the State of Ohio, do hereby certify that the foregoing entry was correctly copied from the records of said Court, to wit, from Journal No. .... Page .....

In Witness Whereof, I have hereunto subscribed my name and affixed the seal of the Supreme Court this 20th day of July, 1966.

THOMAS L. STARTZMAN, *Clerk.*

Excerpt from: Article I, Section 8, United States Constitution.

"The Congress shall have power * * * To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; * * *"

Excerpt from: 28 U.S.C., Section 1257 (3)

"Final judgments or decrees rendered by the highest Court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows: * * * (3) by writ of certiorari * * * where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of * * * the United States."

29 United States Code, Section 185 (a) (Taft-Hartley Act, Section 301 (a)).

"(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

29 United States Code, Section 186 (Taft-Hartley Act, Section 302)

"(a) It shall be unlawful for any employer or association of employers or any person who acts as a labor relations expert, adviser, or consultant to an employer or who acts in the interest of an employer to pay, lend, or

deliver, or agree to pay, lend, or deliver, any money or other thing of value —

(1) to any representative of any of his employees who are employed in an industry affecting commerce; or

• • •

(c) The provisions of this section shall not be applicable

• • •

(5) with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and families and dependents): Provided, That (A) such payments are held in trust for the purpose of paying, either from principal or income or both, for the benefit of employees, their families and dependents, for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or employment benefits or life insurance, disability and sickness insurance, or accident insurance; (B) the detailed basis on which such payments are to be made is specified in a written agreement with the employer and employees and employers are equally represented in the administration of such fund, together with such neutral persons as the representatives of the employers and the representatives of employees may agree upon and in the event the employer and employee groups deadlock on the administration of such fund and there

are no neutral persons empowered to break such deadlock, such agreement provides that the two groups shall agree on an impartial umpire to decide such dispute, or in event of their failure to agree within a reasonable length of time, an impartial umpire to decide such dispute shall, on petition of either group, be appointed by the district court of the United States for the district where the trust fund has its principal office, and shall also contain provisions for an annual audit of the trust fund, a statement of the results of which shall be available for inspection by interested persons at the principal office of the trust fund and at such other places as may be designated in such written agreement; and

* * *

(d) Any person who willfully violates any of the provisions of this section shall, upon conviction thereof, be guilty of a misdemeanor and be subject to a fine of not more than $10,000 or to imprisonment for not more than one year, or both."

* * *

Office-Supreme Court, U.S.
FILED
OCT 26 1966
JOHN F. DAVIS, CLERK

No. 601

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

FRANK CONVERSE, ET AL.,
Petitioners,

vs.

GEORGE J. IGEL & CO., INC.,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Mr. Richard L. Miller and
Mr. John W. Palmer,
150 East Broad Street, Columbus, Ohio,
Attorneys for Petitioners.

Mr. Thomas W. Applegate,
8 East Broad Street, Columbus, Ohio,
Attorney for Respondent.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 601

FRANK CONVERSE, ET AL.,

Petitioners,

vs.

GEORGE J. IGEL & CO., INC.,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

I.

STATEMENT OF THE CASE

There are numerous errors and false conclusions throughout the petition, some of which we feel obligated to call to the Court's attention.

In the first paragraph petitioners refer to "a collective bargaining agreement dated July 23, 1961". We believe this is an error as no such agreement was mentioned in the petition filed in the Trial Court. The agreement which contained the clause out of which the controversy arose is dated July 23, 1959, as is evident by the sixth paragraph of the petition of petitioner. If there is a different contention, this is the first time that the matter has been raised.

We take issue with the fifth paragraph of the petition (page 5) which reads in part as follows "and at all times relevant

hereto, served as its chairman and chief spokesman". According to George J. Igel, and as found by the Trial Court, a jury having been waived by both sides, "In that agreement George Igel took no part and, as a matter of fact, was attempting to reach a separate agreement".

In the seventh paragraph of the statement of facts(page 5) the first sentence states a fact that was controverted and which the Trial Court obviously resolved in favor of the respondent, namely: "during June and July, 1959, at which George J. Igel was present and functioned as the employer spokesman". In the same paragraph the petitioner states that a memorandum of an agreement was drawn up and executed on July 23, 1959, which set forth the agreement between the parties. The memorandum to which the petitioner refers was not executed. It was admitted by the Court over the objection of respondent, "for what it was worth".

The ninth paragraph of the petition on page 6 states as follows:

> "The new agreement obligated the members of BTEA employing operating engineers to pay ten cents per hour for each hour worked by an operating engineer, commencing November 1, 1959, into a *trust fund,* to be established pursuant to Section 302 of the Taft-Hartley Act." (underscoring ours)

At page 22 of the petition the petitioner sets forth the paragraph of the July 23, 1959, contract, signed about one week later, which forms the basis of this case. It is as follows:

> "10. Ten cents per hour worked shall be paid on and after November 1, 1959, for a Welfare Program trust fund to be created and approved by a Joint Committee of Union and Employer representatives on which the Association herein shall have representation or shall have representation on the Committee selecting such joint Committee to create and establish such Welfare Program trust fund. In the event such Welfare Program trust fund is not established and approved by November 1, 1959, the

said ten cents per hour worked payment of this paragraph shall be paid instead to employees covered hereby as wages, unless otherwise mutually agreed by the parties hereto."

We fail to see any provision as to a "trust fund" in the quoted provision of the July 23, 1959, agreement. This executory provision was not included in the bargained contract but was added later (R. p.38).

On page 7 of the petition, petitioner attributes to the Trial Court a finding that state law was applied rather than federal substantive law. With this we cannot agree. The Court was referring to the executory provision of the July 23, 1959, agreement and the finding is consistent with federal substantive law. At the bottom of page 7 the petitioner again draws a conclusion from a fact which was controverted and which the Court found in favor of the respondent.

II.

REASONS FOR NOT ALLOWING THE WRIT

The error which led the petitioner astray is made in the last paragraph of VII on page 10 of the petition. In the first place the Trial Court did not refuse to apply federal substantive law and secondly the facts were not undisputed. The Trial Court held (1) that federal substantive law did not prevent the employer from withdrawing from the employer association, (2) the employer did so withdraw, (3) upon the facts presented the petitioner did not establish a case of liability for payments by the respondent to the Health and Welfare Fund during the period November 1, 1959 to January 1, 1961.

1. Federal Substantive Law did not Prevent the Employer from Withdrawing from the Multi-Employer Bargaining Unit.

In the case of *In the Matter of Pacific Metals Company* Ltd., et al., etc., 91 NLRB 696, the Board in passing on the question of withdrawal of an employer from a multi-employer unit made the following statement at page 699:

"The Board has held that the essential element warranting the establishment of multi-employer units is clear evidence that the employers unequivocally intend to be bound in collective bargaining by group rather than individual action. The correlative standard for excluding an employer from such a unit is evidence of an intent to pursue an individual course of action with respect to labor relations. *The evidence which suffices to establish either intent varies with the circumstances involved.* Here group bargaining has been based on an association. Under circumstances such as are here present, the Board has held that an employer by withdrawing from the association evidences an intention of abandoning group action and to pursue an independent course of bargaining. *Participation for a substantial period of time in group bargaining does not preclude an employer from abandoning such bargaining.* And once such bargaining has been abandoned, the factor which warrants a conclusion that only a multi-employer unit is appropriate has been removed." (underscoring ours)

The instant case was tried to the Court by the choice of both parties. The Court as the trier of the facts found that the George J. Igel Co., Inc. resigned from the employer association; that at the first opportunity after so withdrawing such fact was conveyed to the Union agent; that subsequently the Union carried on individual negotiations with the Company as respects a Health and Welfare Plan, and that by virtue of such facts the Company was not bound by the subsequent actions of the employer association.

Examine the July 23, 1959, agreement as it pertains to the Health and Welfare Fund. It was testified by Frank Converse, the Union Business Manager, as follows:

Q. Actually, the contract as negotiated between BTEA and the Union, contained no provisions for the Health and Welfare Program Plan?

A. That's right.

Q. It was inserted after the negotiations had finished,

isn't that correct? Isn't that right?

A. That's right.

This corroborates the testimony of George Igel that this provision was not negotiated by the committee prior to the end of negotiations. Also, Petitioners' Exhibit 7, is a "memorandum of agreement" that purports to incorporate the provision for the Health and Welfare Fund into the negotiated contract. Where are the signatures of the negotiating committee? Surely this document has some meaning. It is supposedly a later agreement of the negotiating committee. It was never signed, nor as a matter of fact ever implemented. The testimony of Converse was to the effect that BTEA set up a bank account to receive escrow funds. This is not true and no evidence of such an arrangement was ever shown to exist. Again the Union recognized that further negotiations and agreements were needed when they tried to introduce evidence of a verbal agreement between Fred Hauck who was deceased before the trust agreement was executed and one of the Union members who was not even a member of the negotiating committee. Furthermore, about seventeen months after the July 23, 1959, agreement, to-wit: on December 14, 1960, the executive secretary of the Health and Welfare Fund sent the Respondent, the George J. Igel Co., Inc., an envelope (Respondent's Exhibit "A"), (R.p.99) containing the documents shown as Respondent's Exhibits B, C, D, E and F. (R.p.99). It is noted that Respondent's Exhibit C is part of the Appendix "B" agreement of the Ohio Contractors Association providing for the escrow of funds; Respondent's Exhibit D shows that it was necessary for the Ohio Contractors to ratify this agreement as a group; and Respondent's Exhibit F is a registration form and an agreement to be bound.

The question that immediately is asked is were there similar documents for BTEA and if so where are they? Why is there no evidence that BTEA ratified this plan? The memo-

randum of agreement was not signed. No individual registration forms were mentioned as having been tendered to other members of BTEA. The fact is the George J. Igel Co., Inc., was being asked to subscribe as an individual employer to the "Ohio Contractors Operating Engineer's Joint Health and Welfare Plan". What further evidence of individual negotiations is needed? The Igel Company read the material, sought legal counsel and agreed to be bound by the agreement as of January 1, 1961, from which date it has filed the necessary forms to determine liability.

All of the talk about federal substantive Law cannot cure the defects in the evidence produced by petitioners to show respondent's liability by virtue of the July 23, 1959, agreement. In summary the defects are as follows:

1. The Health and Welfare clause was not negotiated to settlement by the negotiating committee. The contrary is shown by Petitioner's Exhibit 7 and testimony of Frank Converse.
2. No competent evidence was produced to show any agreement to pay for the period November 1, 1959, to March 11, 1960, as contemplated by the June 23, 1959, agreement.
3. The appendix "B" agreement (Respondent's Exhibit C) shows that the Health and Welfare Plan was ratified by the Ohio Contractors Association subsequent to July 23, 1959. No such ratification or subsequent agreement is shown as to BTEA.
4. The respondent was requested to sign an agreement to be bound thereby evidencing individual negotiations. (Respondent's Exhibit F)

2. **Was there any Agreement Entered Into Between the BTEA and the Union that would Obligate the Respondent to Petitioners Without Acceptance by Respondent for the Period March 11, 1960 to January 1, 1961?**

The alleged Trust Agreement which forms the basis of this case as respects the alleged payments due from March 11,

1960 to May 1, 1961, is marked Petitioners' Exhibit 4. The parties to this agreement purport to be the various "employer associations" and the "union". Paragraph one states that the members of the "employer associations" are set forth in schedules attached to the document. The BTEA members are purported to be set forth in "Schedule D", "which is attached hereto and made a part hereof". There is no "Schedule D" attached. This agreement purports to be signed by the "duly authorized Employer representative of * * * Building Trades Employers' Association of Columbus". The signature appears to be "Wayne M. Dombrier, Acting Executive Secretary". No evidence whatsoever was produced to identify Dombrier, nor to establish his authority. The evidence was to the effect that one Parker Garwick represented the BTEA in the negotiations of this Trust Agreement. The introduction of this document was objected to by respondent and the Court admitted it over objection saying that it would not be prejudicial.

Federal law may make a collective bargaining agreement a different kind of contract. However, the manner of proving a contract and the identity and authority of the person signing the contract is governed by state law. There is no evidence that the acting executive secretary of this association had any authority to sign this agreement. Respondent's Exhibit 6 reveals that "the affairs of the Association (BTEA) shall be conducted by the seven member Board of Directors", (Article III, Section 6). There is nothing in the record showing a resolution of that Board delegating this power to the executive secretary nor any resolution of that Board referring in any manner to the execution, acceptance or ratification of the document. The answer of respondent put these matters in issue. The burden of proof was on the petitioners. In whatever form an authority is asserted to be the burden of proving it is on the party claiming the benefit of its exercise. In this case the petitioners are relying on the authority of the

BTEA to bind the respondent to the terms of the trust agreement. In order to establish this authority it would be necessary for petitioners to offer "Schedule D" to show that respondent was a member of BTEA on March 11, 1960, and in fact to show that BTEA had a membership on March 11, 1960. Further it would be necessary to show the authority of Dornbrier. In the absence of this proof a ratification or acceptance of the agreement must be shown.

While there is no evidence to show that the Trust Agreement of March 11, 1960, was accepted or ratified by the BTEA, there is evidence that respondent did, after receiving a copy of it, file the forms to determine liability from the first day of the following month, January, 1961. There could be no liability to pay into the fund on the part of the respondent prior to this date.

3. Who are the Proper Parties-Plaintiffs in this Action?

This action was allegedly brought by the Trustees of the "Ohio Operating Engineers Health and Welfare Plan". The style of the case does not reveal the capacity of the plaintiffs. Don Gassen testified that they were trustees in 1961. The trust agreement provides a Section 5.16 as follows:

> "All suits and proceedings to recover Employer payments or to enforce or protect any other right, demand or claim on behalf of the Trustees shall be instituted by the Administrator of the fund in his capacity as such."

This is a clearly written and understandable provision. The real plaintiffs in this action by terms of the instrument itself is the Administrator not the trustees.

SUMMARY

The petitioners base their cause of action on two documents, (1) the contract dated July 23, 1959, and (2) the Trust Agreement dated March 11, 1960. The provision as to the Health and Welfare Fund in the July 23rd agreement is execu-

tory. Further action was necessary. The Union and the BTEA did not take action subsequent to July 23rd in a manner that would legally bind the members of BTEA and the George J. Igel Co., Inc., in particular, who had resigned from BTEA membership.

The authority of the employee of BTEA to sign the Trust agreement, dated March 11, 1960, was not shown, nor is there any showing that the Trust Agreement was executed, accepted, or ratified by the Board of Directors or membership of BTEA. Such execution and ratification on the part of the Ohio Contractors Association is shown by Respondent's Exhibit "B".

The Union negotiated regarding the Health and Welfare Plan with the George J. Igel Co., Inc., and submitted it a registration form and agreement to be bound. After submission of these documents on December 14, 1960, the respondent, George J. Igel Co., Inc., agreed to participate and to be bound from January 1, 1961. No payments were made from January 1, 1961, to May 1, 1961, because of the pendency of this action.

CONCLUSION

The Court did not err in holding that the respondent, George J. Igel Co., Inc., was not bound to make payments to the Ohio Operating Engineers Health and Welfare Plan as claimed by petitioners in their petition for the reasons stated in this brief. The petition for a writ of certiorari should be denied.

Respectfully submitted,

Thomas W. Applegate
Attorney for Respondent

END